MALAYSIAN REPORTS

PUBLIC PROSECUTOR v. SOON SENG SIA HENG
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[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya), Wan Suleiman, Chang Min Tat and Ibrahim Manan F.JJ.) May 2 & 18, 1979]

[Kuala Lumpur — Federal Court Criminal Applications Nos. 1, 2, 3, 6, 7, 8, 9, 10, 11 and 12 of 1979]

Criminal Law and Procedure — Review of cases previously dealt with by High Court and Federal Court — No sufficient grounds for disturbing convictions and sentences — No jurisdiction to confirm or vary order made by Yang di-Pertuan Agong on advice of Pardons Board — Emergency (Essential Powers) Act, 1979, s. 10.

In these cases the accused had all been tried in accordance with the special procedure prescribed by the Essential (Security Cases) Regulations, 1975 and convicted and sentenced. In the first nine cases their appeal to the Federal Court had been dismissed; in the last case the appeal to the Federal Court was pending (See *Soon Seng Sia Heng* v. *Public Prosecutor* [1977] 2 M.L.J. 66; *Chong Soon Koy* v. *Public Prosecutor* [1977] 2 M.L.J. 78; *Ang Eng Chan* v. *Public Prosecutor* [1978] 1 M.L.J. 201; *Public Prosecutor* v. *Lim Hiang Seoh* [1978] 1 M.L.J. 68; and *Public Prosecutor* v. *Chea Soon Hong* [1977] 2 M.L.J. 66). Subsequently as a result of the decision of the Privy Council in *Teh Cheng Poh* v. *Public Prosecutor*,[1] which held that the Essential (Security Cases) Regulations 1975 were *ultra vires* the Constitution, the Emergency (Essential Powers) Act, 1979, was enacted. Applications were thereupon made to the Federal Court for a review of the cases under section 10 of the Act.

In the case of *Public Prosecutor* v. *Lim Hiang Seoh*, the sentence of death had been commuted and the accused had been ordered to be sent to the Henry Gurney School until aged 21.

In the case of *Chea Soon Hoong* v. *Public Prosecutor*, the appeal to the Federal Court was pending.

Held: (1) there were no grounds for disturbing the convictions and sentences in the first eight of the applications and the convictions and sentences must be confirmed;

(2) the Federal Court has no jurisdiction to confirm or vary the executive decision of the Yang di-Pertuan Agong to commute the sentence in the case of *Lim Hiang Seoh* and therefore no order will be made;

(3) as the appeal to the Federal Court in the case of *Chea Soon Hoong* was pending, the application for review will be dismissed.

Cases referred to:

(1) *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50.

(2) *Piare Dusadh* v. *Emperor* A.I.R. 1944 F.C. 13.

(3) *Hinds* v. *The Queen* [1976] 1 All E.R. 353, 372.

The following cases were also cited in argument: *Teh Cheng Poh* v. *Public Prosecutor* [1977] 2 M.L.J. 66; *Warburton* v. *Loveland* 6 E.R. 809; *Government of Malaysia* v. *Zainal bin Hashim* [1977] 2 M.L.J. 255; *Johnson Tan Hun Seng* v. *Public Prosecutor* [1977] 2 M.L.J. 66; *Sweet* v. *Parsley* [1969] 1 All 347, 349; *Govinda* (1880) I.L.R. 3 Mad. 81; *Law Tim Wah* v. *Public Prosecutor* [1978] 1 M.L.J. 167.

FEDERAL COURT.

Criminal Application No. 1/79

Datuk Abu Talib bin Othman (Solicitor-General) for the applicant.

Chew Kar Yee for the respondent.

Criminal Application No. 2/79

Datuk Abu Talib bin Othman (Solicitor-General) for the applicant.

R. Rajasingam for the respondent.

Criminal Application No. 3/79

Datuk Abu Talib bin Othman (Solicitor-General) for the applicant.

Jagjit Singh for the respondent.

Criminal Applications Nos. 6, 7, 8 and 11/79

Datuk Abu Talib bin Othman (Solicitor-General) for the applicant.

Karpal Singh for the respondent.

Criminal Application No. 9/79

Datuk Abu Talib bin Othman (Solicitor-General) for the applicant.

R. Rajasingam (*K. Kumaraendran* with him) for the respondent.

Criminal Application No. 10/79

Datuk Abu Talib bin Othman for the applicant.

K. Thayalan for the respondent.

Criminal Application No. 12/79

Jagjit Singh for the applicant.

Datuk Abu Talib bin Othman for the respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): These applications (the first nine by the Public Prosecutor and the last by the accused) were argued successively on Wednesday, May 2, 1979, and on the following day we confirmed the convictions and sentences of each of the accused, except as to application No. 11 in which we made no order and application No. 12 which we dismissed.

Our reasons were as follows.

The accused in all these cases were tried in accordance with the special procedure prescribed by the Essential (Security Cases) Regulations, 1975, and were convicted and sentenced. They appealed to the Federal Court and their appeals were dismissed.

Subsequently it was held by the Privy Council in another case *Teh Cheng Poh* v. *Public Prosecutor*[1] that the regulations were *ultra vires* the constitution and that therefore the trial of the accused in that case was a nullity.

As many similar trials had been held, Parliament at the instance of Government subsequently passed the Emergency (Essential Powers) Act, 1979 (Act 216) — "the Act" — and when *Teh Cheng Poh* came back from the Privy Council before us to consider whether or not we should order a new trial we held on April 27, 1979, that both the Ordinance (under which the regulations had been promulgated) and the regulations had been validated by Parliament with retrospective effect. That notwithstanding, we ordered a new trial for Teh Cheng Poh for the reasons there stated.

If these accused persons had appealed to the Privy Council, their convictions too would have been quashed and their sentences set aside and the matter referred back to us to consider whether or not to order a new trial. But appeals in criminal matters to the Privy Council were abolished with effect from January 1, 1978, and it was too late for them to appeal further. To dispel public unease, Parliament has made it possible for their cases, notwithstanding that their appeals to this court have been dismissed, to be reviewed by us, and that is how these applications came before us. The relevant provision of the Act is section 10 which reads:

"Where, before the publication of this Act in the *Gazette*, any person charged for any offence under the Internal Security Act, 1960, has been tried in accordance with the Essential (Security Cases) Regulations, 1975, and found guilty and convicted and his appeal to the Federal Court has been dismissed, the Public Prosecutor or such person may by notice of motion apply to the Federal Court within thirty days from the date of publication of this Act in the *Gazette*, or within such further time as the Federal Court may allow, to have such case reviewed, and, in such event, the Federal Court shall have jurisdiction to review such case and make such order as it deems fit."

Be it noted that the section uses the word "review" rather than "appeal". Presumably by the use of the word "review" Parliament intends that an independent and impartial judicial body should, in fairness to the accused, have power in each case to scrutinize the record of the trial and of the appeal and satisfy itself that the charges were lawful, that the accused was given every opportunity to defend himself with the aid of counsel and by being given an opportunity to cross-examine prosecution witnesses and to give evidence himself, if he wished, and to call witnesses for the defence; in other words, that there has been a fair trial. And that thereafter there has been a fair appeal on the merits. The avoidance of the use of the word "appeal" would appear to indicate that Parliament does not intend that after the accused's appeal has been dismissed by this court he should have a second full-scale appeal.

In some of these applications counsel made attempts to persuade us to assess the weight of the evidence for ourselves in order to determine whether or not the conviction was justified on the evidence. Following the example of the Indian Federal Court in *Piare Dusadh* v. *Emperor*,[2] this we declined to do,

"as we hold the view that we should accept as final the conclusions of fact at which [the High Court and the Federal Court have] arrived unless it can be shown that [either court] has either misread any part of the evidence or has overlooked any material portion of it", *per* Spens C.J., p. 13.

Having scrutinized the records, we could not find sufficient grounds for disturbing the convictions and sentences in the first eight of these applications. For this reason we confirmed them.

It was said that since a new trial has been ordered by this court in respect of Teh Cheng Poh, with the possibility that the charge against him might be reduced from a capital to a non-capital one, it would be unfair not to do the same in respect of the accused in these applications who have been sentenced to death. In our judgment, there is a difference between *Teh Cheng Poh's* case and these cases. In the former, his conviction had been quashed and the sentence set aside, and all that we had before us was the order requiring us to consider whether or not we should order a new trial. Here on the other hand the convictions of the accused have not been quashed and their sentences set aside. By virtue of section 9(3) of the Act in our judgment they are lawful and valid — subject to review by us and such order as we deem fit to make under section 10. And as already stated, we do not think that justice requires us to disturb the convictions and sentences.

Criminal Application No. 11

We now come to the Pardons Board to which were referred the cases of those sentenced to death and His Majesty the Yang di-Pertuan Agong's decision to confirm or commute their sentences, and in particular His Majesty's decision in the case of the 14-year old boy, the subject matter of application No. 11, who was ordered to be sent to the Henry Gurney School until aged 21, is now aged 16 and in Form 3 and is reported to be doing well. By virtue of regulation 29 of the regulations, the power to confirm or commute these sentences is with His Majesty on the advice of the Pardons Board, and the learned Solicitor-General argued that whatever decisions had been made by His Majesty is "an act done under the regulations" which has been declared lawful and valid by section 9(3) of the Act, that there was no need for this court to submit another report to His Majesty under the Criminal Procedure Code. He asked us to give a ruling on this matter.

Mr. Karpal Singh for the 14-year old boy argued that we should not disturb the order of commutation already made, as to do so (he said) would be disrespectful to His Majesty.

We made no order as regards whatever decisions had been made by His Majesty on these sentences. When considering whether to confirm, commute, remit or pardon, His Majesty does not sit as a court, is entitled to take into consideration matters which courts bound by the law of evidence cannot take into account, and decides each case on grounds of public policy; such decisions are a matter solely for the executive. We cannot confirm or vary them; we have no jurisdiction to do so. The royal prerogative of mercy, as is recognised by its inclusion in Chapter 3 of Part IV of the Constitution, is an executive power — as in Jamaica, *Hinds* v. *The Queen*.[3]

Criminal Application No. 12

Finally we come to application No. 12, which we dismissed for the following reason. The accused was acquitted by the High Court whereupon the Public Prosecutor appealed and this court ordered a retrial. At the retrial the accused was convicted and his appeal to this court is pending. His appeal not having been dismissed, his application does not therefore come within section 10. But it was said by Mr. Jagjit Singh what he wanted us to review was the earlier decision of this court ordering the retrial of the accused. That too is outside our jurisdiction. Mr. Jagjit Singh will have an opportunity of presenting full arguments when the appeal comes before us.

Order accordingly.

Solicitors: *Chew & Co.; R. Rajasingam; Jagjit Singh; Karpal Singh; Kumar, Chan & Chia; Skrine & Co.*